No. 85-463 (5)

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

KENNETH P. PRILL,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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THE MEYERS DOCTRINE IS RIPE FOR REVIEW

In his Brief in Opposition, Respondent Prill argues that the decision of the National Labor Relations Board to overrule the doctrine of Alleluia Cushion Co., 221 NLRB 999 (1975) is not ripe for review because "there is no split in the circuits." In support, he cites the unanimity of the D.C. and the Second Circuit courts of appeal in this case and Ewing v. N.L.R.B., 768 F.2d 51 (2d. Cir. 1985), arguing that both Circuits reached the identical result and that no other circuits have addressed the issue. He suggests that after remand the parties will have yet another opportunity to argue their positions, the D.C. Circuit will have another opportunity to pass on the wisdom of the Board's decision, and the

case will then be ripe for review by this Court. (Resp. Br.-3).

But we maintain that the D.C. Circuit has already decided the merits of the case and that remand and rehash of the same issues, in the face of the D.C. Circuits strong opposition, would be futile. The D.C. Circuit couches its reversal of the Board's decision in terms of the Board's failure to apply its statutory discretion. In reality, the Court's decision is impregnated throughout with a clear indication that it disapproves of the Board's requirement for objective evidence.

For example, several times throughout the Court's analysis it concludes that the Board has misinterpreted the law. In its discussion of the standard of review, the Court says "We believe

that the Board misinterpreted the law in two respects." App. 53, 54. Furthermore, in its condemnation of the Meyers objective standard, the Court goes into extreme detail regarding the applicability of NLRB v. City Disposal Systems, _____ U.S. _____, 104 S.Ct. 1505 (1984), concluding that although the Board did not have the benefit of the City Disposal decision, Meyers was inconsistent with that decision and therefore a misapplication of law. App. 58-69. Moreover, the Board cites post-Meyers cases, e.g. Jefferson Electric Company, 271 NLRB No. 177, 117 LRRM 1092 (1984) as an indication that under the Meyers standard, a single employee can never be found to be engaged in concerted activities. App. 55.

We maintain that on reading the D.C. Circuit's opinion as a whole, it becomes clear that the Court has concluded that the Board erred as a matter of law by applying "a narrow test" to the interpretation of "concerted activities" in the non-collective bargaining context, and that unless the Board's interpretation on remand clearly permits a finding that a single employee can be engaged in concerted activities, it will never approve a test of the variety announced in Meyers, no matter what the rationale.

As the Legal Foundation of America, in its supporting brief amicus curiae concludes, the Court's decision is nothing more than undisguised disappro-

val of the Board's decision.[1/]

In its simplist terms, Meyers effectively eliminates the concept of "constructive concerted activity" as articulated in Alleluia Cushion and replaces the presumption of concertedness with a requirement for objective evidence. The D.C. Circuit perceives that under this test, a single employee can never be found to be engaged in concerted activity. The reluctance to permit such rule is at the core of the D.C. Circuit's decision and is amply argued throughout the opinion.

It is for this reason that we suggest that the D.C. Circuit has

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1/ Meyers Industries adopts the discussion of amicus curiae regarding the conflict existing in the Circuits concerning the interpretation of "concerted activities".

effectively held that the Board cannot interpret Section 7 to find that concerted activity, outside the collective bargaining arena, requires action by more than one employee.

CONCLUSION

For the above reasons, we respectfully disagree with the position of the Respondent that this case is not ripe, and once again urge this Court to issue a Writ of Certiorari to the D.C. Circuit.

Respectfully submitted,

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